Re Khoo Kay; ex p Tan Jiak Chye

HIGH COURT (PULAU PINANG) — BANKRUPTCY NO 29-416 OF 1994
JEFFREY TAN J
7 JUNE 1999

Bankruptcy *— Practice and procedure — Stay of proceedings — Deposit of sum under allocatur to Official Assignee for payment of judgment creditor — Whether sufficient reason to grant stay*

The judgment debtor applied to stay all proceedings under the bankruptcy petition until disposal of the judgment debtor's motion for leave to appeal to the Federal Court against the whole of the decision of the Court of Appeal. The judgment debtor had deposited a sum of RM209,565.51 with the Assistant Official Assignee, sufficient to pay the judgment creditor in full.

Held, allowing the stay of proceedings:

The act of bankruptcy relied on is the failure to comply with the bankruptcy notice to pay the sum under allocatur. Since the judgment debtor has deposited that sum for payment to the judgment creditor, and considering that the judgment debtor is entitled to exhaust his rights and the judgment creditor is not unsecured, there is sufficient reason to grant the stay (see p 639F–I).

[Bahasa Malaysia summary

Penghutang penghakiman telah memohon untuk menangguhkan semua prosiding di bawah petisyen kebankrapan sehingga selesainya usul penghutang penghakiman untuk kebenaran merayu ke Mahkamah Persekutuan terhadap keseluruhan keputusan Mahkamah Rayuan. Penghutang penghakiman telah mendepositkan suatu jumlah sebanyak RM209,565.51 dengan Penolong Pegawai Pemegang Harta yang mencukupi untuk membayar pemiutang penghakiman dengan penuh.

Diputuskan, membenarkan penangguhan prosiding:

Tindakan kebankrapan yang dikatakan adalah kegagalan untuk mematuhi notis kebankrapan untuk membayar jumlah tersebut di bawah alokatur. Oleh kerana penghutang penghakiman telah mendepositkan jumlah tersebut untuk pembayaran kepada pemiutang penghakiman, dan dengan mempertimbangkan bahawa penghutang penghakiman adalah berhak untuk menggunakan sepenuhnya hak-haknya dan pemiutang penghakiman adalah terjamin, terdapat alasan yang mencukupi untuk membenarkan penangguhan (lihat ms 639F–I).]

Notes

For a case on stay of proceedings, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) para 1956.

Cases referred to

Flatau, Re (1888) 22 QBD 83 (refd)
Low Kok Tuah, Re [1997] 4 CLJ 185 (refd)
Salim bin Ismail & Ors v Lebbey Sdn Bhd (No 1) [1997] 2 MLJ 1 (refd)
Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 (refd)
Walter Su, Re; ex p United Malayan Banking Corp Bhd [1987] 1 MLJ 44 (refd)

Tan Beng Hong (*R Rajasingam* with him) (*Tan Beng Hing & Co*) for the appellant.

Toh Lee Hong (*Kek Boon Wei* with him) (*Kek Ooi & Lee Hong*) for the respondent.

Dharmasegaran for the Official Assignee.

Cur Adv Vult

Jeffrey Tan J: This is the judgment debtor's application (encl 52 dated 31 May 1999) to stay all proceedings under the bankruptcy petition, until disposal of the judgment debtor's motion for leave to appeal to the Federal Court against the whole of the decision of the Court of Appeal.

On the background facts, on 26 April 1995, the learned senior assistant registrar made a receiving order for the protection of the judgment debtor ('JD') and adjudged the JD a bankrupt, and on 1 August 1995, Vincent Ng J dismissed the JD's appeal to judge-in-chambers against the receiving order and adjudication order. According to encl 51 (the affidavit of the JD dated 28 May 1999), and the following are not disputed by the judgment creditor ('JC') on 13 April 1999, the Court of Appeal dismissed the JD's appeal against the order dated 1 August 1995, and on 6 May 1999, the JD filed an application for leave to appeal to the Federal Court against the whole of the decision of the Court of Appeal.

It cannot be gainsaid that an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from. Naturally, an application for leave to appeal, which is very much less than an appeal, shall also not operate as a stay of execution or of proceedings under the decision to be appealed from (see *Re Low Kok Tuah* [1997] 4 CLJ 185, where Low Hop Bing J held that 'there has to be a proper and valid appeal pending in the court before an application for stay may be considered').

Nonetheless, with regards to bankruptcy proceedings, 'the court may any time after the presentation of a bankruptcy petition stay any action, execution or other legal process against the property or person of the debtor' (s 10 of the Bankruptcy Act 1967), and 'the court may at any time for sufficient reason, make an order staying the proceedings under a

bankruptcy petition, either altogether or for a limited time, on such terms and subject to conditions as the court thinks fit' (s 97 of the Bankruptcy Act 1967). Although it should be added, notwithstanding the provisions of s 6(4) the Bankruptcy Act 1967, that when in a bankruptcy petition, the act of bankruptcy relied on is the failure to comply with the bankruptcy notice to pay a judgment debt, the mere fact that an appeal is pending over the judgment is not a sufficient ground for staying the proceedings upon the petition (*Re Flatau* (1888) 22 QBD 83; *Re Walter Su; ex p United Malayan Banking Corp Bhd* [1987] 1 MLJ 44).

Predictably, in their respective affidavits, the JD contended that there are merits in his application for leave to appeal, whilst the JC contended that there are no prospects of success in the intended appeal. Mr Tan Beng Hong for the JD entreated that the stay sought is only until disposal of the leave application, whilst Miss Toh Lee Hong for the JC objected to a stay. However, there is no dispute whatsoever that the JD has deposited the sum of RM209,565.51, which according to Mr Dharma for the Assistant Official Assignee is more than enough to pay the JC in full and would be released to the JC upon the request of the JC, with the Assistant Official Assignee.

'The paramount consideration governing an application for a stay, whether of execution or of proceedings, or in the case of an application for some other form of interim preservation of the subject matter of the appeal ... is that the appeal ... if successful, should not be rendered nugatory' (*See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 at p 610, per Gopal Sri Ram JCA). In deciding whether to grant a stay, the court 'has to balance the ... repercussions' (*Salim bin Ismail & Ors v Lebbey Sdn Bhd (No 1)* [1997] 2 MLJ 1, per Mahadev Shankar JCA); the court has to have regard to all the circumstances of the case (*Re Walter Su* at p 45).

And in the instant case, the balance is in favour of a stay. The act of bankruptcy relied on is the failure to comply with the bankruptcy notice to pay the sum under allocatur dated 9 February 1994. But that sum has been deposited since with the Assistant Official Assignee. And since that sum has been deposited already with the Assistant Official Assignee, it means, even if a stay is refused, that the sum under the allocatur would be settled and that the next proceeding under this bankruptcy petition would be or ought to be the JD's application for an order of discharge, such that all other proceedings if any to prosecute this bankruptcy petition would be idle, and would even be wholly unreasonable. On the other hand, a refusal of a stay would foist upon the JD, notwithstanding his deposit of the sum under the allocatur, the disqualification and disability of a bankrupt, which repercussions could not be undone even if leave to appeal is obtained. In the circumstances of the case, when the act of bankruptcy relied on is the failure to comply with the bankruptcy notice to pay the allocatur dated 9 February 1994, whereas the JD has deposited the sum under allocatur dated 9 February 1994 for payment to the JC, whereas the JD is entitled to exhaust his rights, and whereas the JC is not unsecured, there is sufficient reason to grant the stay.

Accordingly, it is ordered that all proceedings under the bankruptcy petition be stayed until disposal of the JD's application for leave to appeal to the Federal Court.

Stay of proceedings allowed.

Reported by Loo Lai Mee